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In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2060

CARL M. AUSTIN, et. al., *Appellants,*

v.

STATE OF NEW HAMPSHIRE, et. al., *Appellees*

On Appeal from the Supreme
Court of the State of New Hampshire

BRIEF FOR THE APPELLEES

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v.

STATE OF NEW HAMPSHIRE, et al., Appellees.

On Appeal from the Supreme
Court of the State of New Hampshire

BRIEF FOR THE APPELLEES

OPINION BELOW

The Opinion of the Supreme Court of New Hampshire, dated February 28, 1974, is reported at 114 N.H. 137, 316 A. 2d 165 as *Carl M. Austin, et al* v. *State Tax Commission*, Merrimack No. 6641. It is included in Appendix B of Appellants' Jurisdictional Statement at pp. A4-A9.

JURISDICTION

The jurisdiction of this Court is set out in the Brief for the Appellant at p. 2. The State of New Hampshire filed a Motion to Dismiss on September 11, 1974, urging this Court to refuse jurisdiction for want of substantial federal question. On October 15, 1974, this Court noted probable jurisdiction.

QUESTIONS PRESENTED

The New Hampshire Commuters Income Tax reaches income of Maine residents earned in New Hampshire and, in concert with the Maine Income Tax, diverts to New Hampshire an amount of tax which the Maine resident would otherwise be required to pay to Maine. New Hampshire residents, although taxed in various ways, do not pay a tax upon income earned in New Hampshire. The questions presented are:

1. Whether the operation of the New Hampshire Commuters Income Tax deprives the Appellants of rights secured to them by the Privileges and Immunites Clause of Article IV, § 2 of the United States Constitution.

2. Whether the operation of the New Hampshire Commuters Income Tax deprives the Appellants of rights secured to them by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the Appellants have standing to prosecute this appeal.

STATUTES INVOLVED

The statutes involved are New Hampshire Revised Statutes Annotated, Chapter 77-B (RSA 77-B) and Maine Revised Statutes Annotated, Title 36, Part 8, §§ 5111 and 5127. Relevant sections of both statutes are included as a Statutory Appendix to this brief.

STATEMENT

This case was brought by three residents of the State of Maine who were employed in the State of New Hampshire during the taxable year 1970. Pursuant to New Hampshire Revised Statutes Annotated [RSA] 77-B, their employers withheld from their wages and salaries the amount of tax imposed upon their New Hampshire derived income as defined in RSA 77-B:1 (X).

The amount of tax so imposed by RSA 77-B:2 (II) was, under the provisions thereof, made equal to the amount of tax which would have been due the State of Maine under its income tax law had the income been earned in Maine.

Since the Maine tax law provides a credit against the Maine income tax for the amount of income subject to Maine tax which is also taxed by another jurisdiction, e.g., New Hampshire, the plaintiffs' tax-load was unaltered by the operation of RSA 77-B. Rather, that amount of tax was diverted to New Hampshire which would have been paid to Maine in the absence of the New Hampshire taxing statute.

The plaintiffs filed both New Hampshire and Maine tax returns for the year 1970. In December, 1971, the plaintiffs caused a petition for declaratory judgement to be filed. The defendant moved to dismiss, which motion was denied, exceptions noted, and all issues raised were transferred without ruling to the New Hampshire Supreme Court on September 20, 1972.

The New Hampshire Supreme Court issued a final judgement for the defendant declaring RSA 77-B to be not violative of either the privileges and immunities or equal protection clauses of the United States Constitution.

SUMMARY OF ARGUMENT

The New Hampshire Commuters Income Tax is specifically designed to fill a gap in the tax structure of that State, which structure does not include a broad-based income tax. New Hampshire taxes its citizens in various ways, and the Commuters Income Tax is intended to assess residents of other states who generate income in New Hampshire a fair share of the burden of supporting the government. That is done in a manner which does not alter the ultimate tax burden of the non-resident taxpayer, but merely diverts to

New Hampshire an amount which would otherwise be paid to the home state. The Appellees assert that the underlying lack of economic impact upon the Appellants results in a lack of standing in the Appellants to challenge the constitutionality of the tax, and further forecloses any claim by the Appellants of a denial of equal protection or of privileges and immunities, since they are not treated by New Hampshire in any different fashion than they would be by the State of Maine in the absence of the New Hampshire tax.

ARGUMENT

I

INTRODUCTION

This case has been brought to this Court by the Appellants, all residents and taxpayers of the State of Maine, upon a framing of issues which, understandably, suggests the result which they would have this Court reach. It shall be the underlying theme of this argument by the State of New Hampshire that the issues as framed by the Appellants do not comprehend the entire matter to be considered, and that the analysis given each of the questions presented must have as its premise that the Appellants suffer no cognizable injury as a result of the application to them of the Commuters Income Tax. That premise, which is itself a conclusion, is accordingly treated first, and separately, in the argument which follows.

II

THE APPELLANTS SUFFER NO INJURY AS A RESULT OF THE APPLICATION TO THEM OF THE COMMUTERS INCOME TAX

The taxing provision at issue in this case is RSA 77-B:2, which reads as follows:

Tax Imposed.

I. On residents, Income Earned Outside New Hampshire. A tax is hereby imposed upon every resident of the state,

which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 "New Hampshire taxable income;" provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph.

II. On Nonresidents, Income Earned in New Hampshire. A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.

III. Exception. Notwithstanding the provisions of paragraphs I and II, no tax shall be imposed upon salaries paid to men or women in the armed forces of the United States.

In order to assess the net impact of the above provision upon the Appellants, one must consider also the operation of the Maine Income Tax Law, Maine Revised Statutes Annotated, Title 36, Part 8, §5111 "Imposition and rate of tax" and §5127 "Credit for income tax paid to another state" (statutory appendix, p.15). The latter provision, in particular, provides in pertinent part that

> "a resident individual shall be allowed a credit against the tax otherwise due under this part for the amount of any income tax imposed on him for the taxable year by another state . . . on income derived from sources therein and which is also subject to tax under this part."

A. The Tax Imposed Creates a Classification of Property, not Taxpayers.

The Appellants profess to agree with the New Hampshire Supreme Court in the opinion below that the tax should be viewed "in terms of its practical effect and operation." (Brief for the Appellants, p. 9). In order to determine that practical effect, however, one must consider all of the provisions of the statute in order to understand fully the theory and intent of the legislature as evidenced by the statute.

A careful reading of RSA 77-B:2 (I) & (II) reveals that the initial, and most significant, classification created by that provision is that of *income earned outside the state of residence* as distinguished from income earned within the state of residence. The tax is *imposed* upon out-of-state income, without regard to whether the taxpayer is a resident or non-resident of New Hampshire. The rate of taxation is limited with respect to both residents and non-residents so that it does not exceed the rate imposed by the state of the non-resident. As to both resident and non-resident, the full amount of tax paid to the state in which the income is earned is allowed as a credit against the tax imposed by the state of residence. For New Hampshire residents this credit is built into RSA 77-B:2 (I); for Maine residents it is provided by §5127, above quoted. In both cases a tax *is* imposed by the state in which the income is earned. Finally, and most significantly, the net change in the tax burden upon both residents and non-residents of New Hampshire is zero.

What the foregoing analysis reveals, we submit, is a balanced taxing provision which gives effect to a legislative policy determination that the state in which income is earned is the appropriate party to tax that income, so that it may be made to bear a ratable share of the expenses of government. *Shaffer* v. *Carter*, 252 U.S. 37, 53 (1920). Both New Hampshire and Maine subscribe to that policy in that they provide the credits above mentioned for taxes paid to the state in which income is earned. Not to be overlooked, also, is the fact that New Hampshire residents working in Maine are taxed by Maine (§5111, statutory appendix, p.14) for no other discernable reason than to secure "a ratable contribution . . . for the support of the government." *Shaffer* v. *Carter*, *Id*

B. The Operation of the Withholding Provision Causes No Cognizable Injury.

It has been settled by this court that withholding provisions do not give rise to a constitutionally cognizable injury. *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 76 (1920), *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232, 236. Neither the Appellants nor the States of Maine and Vermont, *Amici Curiae*, have cited any authority or adduced any compelling argument to the contrary.

C. Loss of Revenue in Bulk by State of Maine Causes No Specific Injury To Appellants.

It may be taken as given that the Commuters Income Tax, in conjunction with the Maine Income Tax provisions, results in a diversion to New Hampshire of tax revenue otherwise available to Maine.

The State of Maine has presented figures to show that each Maine resident is injured in the average amount of $.40 by that diversion. These calculations are not a part of the record in this appeal, and have never been subjected to judicial scrutiny. To the extent that they are accurate, however, they tend to show that the impact of the Commuters Income Tax upon the Appellants is indeed *de minimis*.

III

THE APPELLANTS LACK STANDING TO PROSECUTE THIS APPEAL

The question of standing is one for this Court to resolve regardless of the position taken by the court below. This Court may find standing where it was denied below, *Allied Stores of Ohio, Inc* v. *Bowers*, 358 U.S. 522 (1959); or deny standing where granted below. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952).

The Appellants do not treat the standing issue at length, but seem to rely upon *Allied Stores*, *supra* to settle the question (Brief for the Appellants, p. 18). We submit that *Allied Stores* is not at all compelling on the issue of standing, since the opinion below turned primarily upon the capacity to provide meaningful relief, and none of the parties seems to

have challenged Allied's claim of economic injury. The contrary obtains here, since the Appellees assert that the Appellants have suffered no harm, a proposition with which *Allied Stores* did not deal.

The State of Maine, however, approaches the standing issue on behalf of the Appellants, and relies primarily upon *Flast* v. *Cohen*, 392 U.S. 83 (1968). As we noted in our argument relative to injury, above, the matters adduced by the State of Maine with regard to the economic impact of the Commuters Income Tax are not of record. This much may be said, however: since the economic impact of the diversion of revenue falls *first* upon the State of Maine, the State of Maine is the proper party to litigate any injuries claimed to result therefrom. This Court should not permit the Appellants here to litigate the rights of absent third parties. *Flast* v. *Cohen*, *Id.*, n. 20; *Heald* v. *District of Columbia*, 259 U.S. 114 (1922). Exceptions to this principle have been created only where compelling First Amendment rights are at stake. See *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

Furthermore, we submit that Maine's reliance upon the "automatic standing" of *Flast* is misplaced. *Flast*, and the principles upon which it departed from the long-established rule of *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), involve challenges to the exercise of congressional power under the taxing and spending claims of Art. I, § 8, of the Constitution. The result in *Flast*, we submit, turned upon a perceived need for a liberalized taxpayer standing rule to provide a sufficient group of potential litigants positioned to challenge federal spending legislation where appropriate. This Court said, in outlining the first part of the two-part rule, that the "nexus" required between the taxpayer and the federal statute is "consistent with the limitation imposed upon state-taxpayer standing in federal courts in *Doremus* v. *Board of Education*, 342 U.S. 429 (1952).

The *Flast* and *Doremus* decisions, read together, do not create the "automatic standing" for a taxpayer urged by the State of Maine (Brief of States of Maine and Vermont, p. 5). Rather, the Court in *Doremus* quoted from *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923):

> "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained . . . some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."
>
> 342 U.S. at 434

The Appellants herein do not, we submit, meet the test for state-taxpayer standing set out in *Doremus* and *Flast*, and they should not be allowed to litigate the rights of the State of Maine. See also *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 282-3 (1961).

IV

THE COMMUTERS INCOME TAX IS NOT VIOLATIVE OF EITHER EQUAL PROTECTION OR PRIVILEGES AND IMMUNITIES PROVISIONS OF THE THE UNITED STATES CONSTITUTION

We have examined at some length the reasons why the Appellants have no cognizable injury from the application to them of the Commuters Income Tax. The same reasons and lack of injury are the basis for our submitting that there is no deprivation of constitutional rights effected by the New Hampshire Tax. It is our position that the cases of *Shaffer* v. *Carter*, 252 U.S. 37 (1920), and, by negative implication, *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), are dispositive of this appeal on the issue of privileges and immunities.

The taxation by a state of non-residents, *per se* involves no violation of the privileges and immunities clause of the Federal Constitution. *Shaffer* v. *Carter*, Id. In that case it was said:

> That a State, consistently with the Federal Constitution, may not prohibit the citizens of other States from carrying on legitimate business within its borders like its own citizens, of course is granted: but it does not follow that the business of non-residents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one State has the right to hold property or carry on an occupation or business in another is a very

reasonable ground for subjecting such non-resident, although not personally yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter State.

The key phrase here is "not more onerous in effect. . . ." So long as the ultimate burden upon residents and non-residents is substantially unaltered by the incidence of the tax, there is no constitutional infirmity. *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S. Ct. 228 (1920), relied upon by the appellants, is not compelling here. The New York income tax law under consideration in that case had the unavoidable effect of increasing the total tax burden of the non-residents to which it applied, since the neighboring States of New Jersey and Connecticut had no income tax in effect, and at the same time providing that that increase in tax burden should be greater for non-residents than for residents. The New York law was accordingly held to violate the privileges and immunities clause of the Federal Constitution. The balance of the opinion in *Travis* confirmed the principles enunciated in *Shaffer* v. *Carter*, *supra* and we submit that the decision in *Travis* marks the point at which the line ought to be drawn. Beyond that point there is no demonstrable injury, and the decision should be in favor of the statute.

The equal protection clause, in like manner, affords no grounds for attack upon RSA 77-B. The power to tax is an attribute of state sovereignty, and,

> "Although the wide discretion as to classification retained by a legislature often results in narrow distinction, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification." *German Alliance Ins. Co.* v. *Lewis*, 233 U.S. 389, 418, 34 S. Ct. 612 (1914).

Furthermore, the practical, rather than the theoretical, effect is the standard by which tax statutes are to be measured.

> "[t]he constitutional prohibition applies only to taxation which in fact bears unequally on persons or property of the same class and that mere differences in modes of assessment do not deny equal protection

unless they are shown to produce such inequality." *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232, 236 (1890).

As noted in the opinion below, the source of revenue reached by RSA 77-B is, for lack of personal jurisdiction over non-residents, the only source available from which to assess and effect the "ratable contribution in taxes for the support of the government." *Shaffer* v. *Carter*, *supra*.

Contrary to the assertions of the Appellants, who are faced now with a record insufficient to support allegations of gross inequality of tax burden, we urge that this Court not change its long-standing rule that:

> . . .the presumption of constitutionality can be overcome by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."
> *Madden, Executor* v. *Kentucky*, 309 U.S. 83 (1940)

We respectfully submit that the Appellants have failed to carry that burden, and that the Judgement of the New Hampshire Supreme Court should be affirmed.

Respectively submitted,

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STATUTORY APPENDIX

NEW HAMPSHIRE
REVISED STATUTES ANNOTATED

Chapter 77-B
(as enacted by Chapter 20, Laws of 1970 and amended by Chapter 57, Laws of 1970)

Commuters Income Tax

77-B:1 Definitions. As used in this chapter the following terms shall have the following meanings unless the context clearly requires otherwise:

I. "Adjusted gross income" shall mean, for any taxable year, the adjusted gross income as defined in the United States internal revenue code in effect for that taxable year but excluding income which under the code is exempted from taxation by the state.

• • •

VI. "New Hampshire taxable income" shall mean, for any taxable year, taxable income as defined under the United States internal revenue code in effect for that taxable year less any New Hampshire derived income, less an exemption of two thousand dollars and less any taxable business profits taxed pursuant to the business profits tax.

• • •

X. "New Hampshire derived income" shall mean, for any taxable year:

(a) rents, royalties and gain derived from the ownership of property within the state;

(b) wages, salaries, fees, commissions or other income received with respect to personal services performed of whatever kind and in whatever form paid derived from activities (1) performed within this state, or (2) performed from a base of operations within this state and not subject to an income tax within the state where the services are performed.

(c) income derived from every business, trade, occupation or profession of the taxpayer to the extent that the business, trade, occupation or profession is carried on within the state. But New Hampshire derived income shall not include any income excluded from adjusted gross income as defined in this section nor any taxable business profits taxed pursuant to the business profits tax.

XI. "Resident" shall mean:

(a) an individual domiciled in the state except one who maintains a permanent place of abode outside the state, does not maintain one within the state and does not spend more than thirty days of the taxable year within the state; or

(b) an individual who maintains a permanent place of abode within the state and spends more than one hundred eighty-three days of the taxable year within the state.

XII. For the purposes of this act, interest, dividends and capital gains received by the taxpayer from the ownership or sale of stock or from a beneficial interest in a trust and all income received by the taxpayer from a retirement system of any kind or from an annuity or other insurance plan shall be deemed to have been earned in the state of residence of said taxpayer.

77-B:2 Tax Imposed.

I. On Residents, Income Earned Outside New Hampshire. A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 "New Hampshire taxable income:" provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph.

II. On Nonresidents, Income Earned in New Hampshire. A

tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.

III. Exception. Notwithstanding the provisions of paragraphs I and II, no tax shall be imposed upon salaries paid to men or women in the armed forces of the United States.

MAINE REVISED STATUTES ANNOTATED

TITLE 36, PART 8

§ 5111. Imposition and rate of tax

A tax is hereby imposed for each taxable year on the entire taxable income of every resident individual of this State and on the taxable income of every non-resident individual which is derived from sources within this State. The amount of the tax shall be determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $2,000	1% of the taxable
$2,000 but not over $5,000	$20 plus 2% of income excess over $2,000
$5,000 but not over $10,000	$80 plus 3% of excess over $5,000
$10,000 but not over $25,000	$230 plus 4% of excess over $10,000
$25,000 but not over $50,000	$830 plus 5% of excess over $25,000
$50,000 or more	$2,080 plus 6% of excess over $50,00

• • • •

§ 5127. Credit for income tax paid to another state

1. Resident individual. A resident individual shall be allowed a credit against the tax otherwise due under this part for the amount of any income tax imposed on him for the taxable year by another state of the United States or a political subdivision thereof or the District of Columbia on income derived from sources therein and which is also subject to tax under this part.

2. Limitation on credit. The credit provided under this section shall not exceed the proportion of the tax otherwise due under this part that the amount of the taxpayer's adjusted gross income derived from souces in the other taxing jurisdiction bears to his entire adjusted gross income as modified by this part.